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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No.

CONRAD JOYNER,
Petitioner,

vs.

ROSE MOFFORD, et al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the Qualification Clause of the Constitution prohibit a state from requiring that state-elected officials who are candidates for federal office resign before running for federal office?

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The petitioner, Conrad Joyner, respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix B) is reported at 706 F.2d 1523 (1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 23, 1983. A timely petition for rehearing was denied on July 12, 1983. The mandate was issued on July 20, 1983. This petition

is filed within the time permitted under 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

Does the Qualifications Clause of the Contitution prohibit a state from requiring that state-elected officials who are candidates for federal office resign before running for federal office?

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const. Art. I, § 2, cl.2 (The Qualifications Clause):

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

2. Ariz. Const. Art. XXII, § 18:

Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

STATEMENT OF THE CASE

In 1980, the Arizona Contitution was amended to add Article XXII, § 18. The new provision, known as a "resign-to-run" clause, requires an elected, salaried public official to resign when running for other office, unless he or she is in the last year of the term of office.

In 1980, petitioner, Conrad Joyner, was elected to

a third four-year term as County Supervisor in District 5 of Pima County, Arizona. In 1982, due to decennial reapportionment of congressional districts, a new fifth congressional district for Arizona was formed. Joyner, who was interested in running for the new congressional seat, filed a declaratory judgment action under 28 U.S.C. § 2201 to challenge the constitutionality of the resign-to-run provision.

Cross-motions for summary judgment were filed, and the District Court ruled that the provision was unconstitutional. *Joyner v. Mofford*, 539 F.Supp. 1120 (D. Ariz. 1982) (*See* Appendix A). The state filed a timely appeal to the United States Court of Appeals for the Ninth Circuit, which reversed the District Court.

After the District Court struck down the resign-to-run provision, Joyner filed petitions for nomination to seek election to the Fifth District. He did not resign as County Supervisor. Joyner was subsequently defeated in the primary election.

After the mandate issued from the Court of Appeals, the Arizona Attorney General threatened to remove the petitioner from his county office through the *quo warranto* power of A.R.S. § 12-2041. Petitioner moved for a stay and an order withdrawing the mandate, and the Court of Appeals granted that motion.

REASONS FOR GRANTING WRIT

1. **The opinion below is inconsistent with prior decisions of this Court interpreting the Qualifications Clause of the United States Constitution.**

The Constitution has set forth three qualifications for eligibility to the House of Representatives: a member must be 25 years of age, must be a United States

citizen for 7 years, and must be a resident of the state from which he shall be chosen. Art I, § 2, cl.2 (The Qualifications Clause). This Court has held that these three qualifications are exclusive and cannot be varied, even by Congress. *Powell v. McCormack*, 395 U.S. 486 (1969).

> In short, both the intention of the Framers, to the extent it can be determined, and an examination of the basic principles of our democratic system persuade us that the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote. *Id.* at 548.

Powell also discusses, in dicta, the ability of a state to change the Qualifications Clause and concludes that a state has no more power to do so than does Congress. *Id.* at 543. The effect of Article XXII, Section 18, of the Arizona Constitution, is to require four qualifications for candidacy for the House of Representatives: 25 years of age, a United States citizen for 7 years, a resident of the State from which he shall be chosen *and* to not be an elected state official in other than the last year in office. This is an impermissible attempt by a state to vary the Qualifications Clause of the Constitution.

A. The Arizona provision is an extra qualification for candidacy to Congress.

The Court of Appeals held Arizona resign-to-run provision constitutionally permissible because it ". . . merely bars state officeholders from remaining in their position should they choose to run for federal office." *Joyner v. Mofford*, 706 F.2d, at 1528. The resulting "burden on candidacy" was deemed acceptable because it was "attributable to a desire to regulate state office-

holders and not to impose additional qualifications to serving in Congress." *Id.*

Whatever the intention of the provision, its effect is, as the Court of Appeals recognized, to place a "not inconsequential" burden on candidacy for federal office. *Id.* at 1533. The history of the Qualifications Clause and its judicial interpretation highlights its exclusivity and demonstrates that such a burden is an impermissible qualification.

The Qualifications Clause was debated at length at the Constitutional Convention. The delegates concluded that only a few basic minimum qualifications should be prerequisites to membership in Congress. *Powell v. McCormack,* 395 U.S. at 532-36, 541. As James Madison wrote, once a person met the minimum standards found in the Qualifications Clause:

> . . . [t]he door of this part of the federal government is open to merit of every description, whether native or adopted, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.

The Federalist Papers, 326 (Mentor ed. 1961).
As this Court has noted, one of the main concerns at the Convention was that if the qualifications for federal office were subject to variation by the legislature, it could "by degrees subvert the Constitution." *Powell v. McCormack,* 395 U.S., at 533-34.

While the Qualifications Clause does not expressly limit states from adding qualifications either directly or indirectly, it seems clear that by listing only three qualifications "it meant to exclude all other as prerequisites."

1 Story, *Commentaries on the Constitution of the United States*, § 625, at 461 (1891 ed.).

The Court of Appeals, based on *Clements v. Fashing*, 102 S.Ct. 2836 (1982) and *Signorelli v. Evans*, 637 F.2d 863 (2d Cir. 1980), found several justifications for the Arizona resign-to-run provision. The provision theoretically encourages public officials to devote themselves to their office, prevents them from using their office as a "stepping stone," prevents abuse of the office, and protects the expectations of the electorate. *Joyner v. Mofford*, 706 F.2d, at 1532.

These justifications are very legitimate. But, they are no more important than the justifications in *Powell*: the honesty and integrity of Congress. Just as the justifications in *Powell* did not allow Congress to exclude Adam Clayton Powell, so to must Arizona's provision fail. Neither the Congress nor a state can ever vary the absolute standards of the Qualifications Clause. The rationality of the reasons to vary the Qualifications Clause is not the issue.

Clements involved a restriction on state officeholders running for state office. As Justice Stevens (as well as the four dissenting members of the Court) noted in his concurring opinion, there was no federal interest involved in *Clements*. Further, there was no Qualifications Clause issue in *Clements*.

In *Clements*, this Court applied only a rational basis test. The Ninth Circuit, which ruled that Arizona's provision would survive even a strict scrutiny analysis, implies in its holding that whenever a state has a valid reason, it may contradict, burden or otherwise restrict the exercise of federal constitutional rights. When this

implicit conclusion is taken into consideration, it becomes obvious that neither rational basis nor strict scrutiny is an appropriate test for the Arizona provision. Rather, any action by a state which affects eligibility for federal office must be, per se, invalid. *See generally, Celebreeze v. Anderson,* 103 S.Ct. 1564, 1578-79. (1983).

This Court has never considered the Qualifications Clause issue in this factual situation. In a similar case, however, involving the validity of a resign to qualify to run for Congress statute, Justice Black stated that he thought such a restriction was unconstitutional. *Davis v. Adams,* 400 U.S. 1203 (1970). *See also, Stack v. Adams,* 315 F.Supp. 1295 (N.D. Fla. 1970) and *State ex rel Davis v. Adams* 238 So.2d 415 (Fla. 1970). The opinion of Justice Black, while not controlling authority, *Locks v. Commanding General, Sixth Army,* 89 S.Ct. 31, 32 (Douglas, Circuit Justice, 1968), is nonetheless persuasive because it dealt with a similar provision.

Numerous other state and federal district courts agreed with Justice Black and invalidated state provisions regulating candidates for federal office. *Joyner v. Mofford,* 706 F.2d at 1529, fn.4. See also, *State ex rel. O'Sullivan v. Swanson,* 127 Neb. 806, 257 N.W. 255 (1934); *People v. Sischo,* 23 Cal.2d 478 144 P.2d 785 (1943); *State ex rel. Santini v. Swackhamer,* 90 Nev. 153, 521 P.2d 568 (1974); *United States v. Richmond,* 550 F.Supp. 605 (E.D.N.Y. 1982). While these provisions differed in form and intent, their effect was disqualification from seeking federal office.

The Ninth Circuit distinguished resign-to-run laws such as Arizona has, from resign-to-qualify-to-run laws

such as found in *Stack*. The distinction is not appropriate. Since state officeholders seeking federal office know that if they run, they must resign their state office, the effect of the two laws is identical, regardless of any differences in form.

B. The Arizona provision limits the number of potential candidates.

The second effect of the resign-to-run provision is to limit the number of candidates for federal public office. It is an undisputed principle of our form of government that the people have the right to elect whom they choose. 2 *Debates on the Federal Constitution* 257 (J. Elliot ed. 1876) cited in *Powell v. McCormack*, 395 U.S., at 540-41. *See also, Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). This right is "undermined as much be limiting whom the people can select as by limiting the franchise itself." *Powell v. McCormack*, 395 U.S. at 547.

While the State's focus on the Arizona provision has been on the office and the officeholder, it must be recognized that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143 (1972); *Celebreeze v. Anderson*, 103 S.Ct. at 1568. Therefore, before any analysis of a law restricting potential candidates is complete, "it is essential to examine in a realistic light the extent and nature of [its] impact on voters." *Bullock v. Carter*, 405 U.S. at 143; *Celebreeze v. Anderson*, 103 S.Ct. at 1568.

The resign-to-run provision effectively prevents an elected officeholder who is unwilling to resign, from seeking federal office. It therefore limits the choices available to the electorate.

The impact of the Arizona resign-to-run provision extends beyond Arizona's voters. It is a state's attempt to unduly restrict the choice of candidates for the United States Congress. By enacting a law which restricts the selection of candidates for national office, the state attempts to impose its will in an area where it is, by the Constitution, powerless to do so. As this Court recently ruled there is an overriding ". . . pervasive national interest in the selection of candidates for national office, and *this national interest is greater than any interest of an individual state. Cousins v. Wigoda*, 419 U.S. 477, 490 (1975)." *Celebreeze v. Anderson*, 103 S.Ct. at 1573 (Emphasis added).

No matter how compelling Arizona's interest is, it cannot override the national interest in the unrestricted choice of candidates for federal office. This national interest affects every citizen in the country, and a state is powerless to attack or limit this national interest.

2. National uniformity is needed because State provisions requiring resignation of state officeholders when running for federal office and judicial interpretation of those provisions vary greatly.

As set forth in Appendix C, at least 35 states have constitutional or statutory provisions that require state officeholders to resign from their offices when they either seek election to or are elected to federal office. The case law interpreting these provisions is not con-

sistent. *See generally, Joyner v. Mofford*, 706 F.2d 1529-30 and fn. 4.

These state provisions are resign to qualify to run, resign to run, and resign upon election to other office statutes and some declare certain officeholders ineligible during their term. This great diversity precludes a uniform approach to candidacy to federal office. This Court should address the important issue of whether a state can in any way affect the eligibility of state officeholders to run for Congress. National uniformity should be established.

If the decision of the Ninth Circuit is upheld, then based on the number of states that have already shown an interest in regulating the conduct of their officeholders running for federal office, the potential for the adoption in each of the states of the type of regulation that Arizona has, is very significant. This potential raises the very real possibility of a *de facto* amendment to the United States Constitution, adding a fourth qualification to the Qualifications Clause.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of The United States Court of Appeals for The Ninth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

CONRAD JOYNER,

Plaintiff,

vs.

ROSE MOFFORD, Secretary of State, State of Arizona; et al,

Defendants.

NO. CIV 82-196 TUC ACM

ORDER

Plaintiff has brought this action in the United States District Court praying that this court declare unconstitutional Article XXII, § 18 of the Constitution of the State of Arizona and to enjoin the defendants from enforcing that provision against the defendant. This court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201 and 2202.

Defendant Rose Mofford is the Secretary of State for the State of Arizona and is statutorily required to accept petitions of candidates for federal office. Defendant, Robert Corbin is the Attorney General of the State of Arizona and is authorized under A.R.S. § 12-2041 to bring an action against any person who unlawfully holds any public office within the State of Arizona. Defendant, Steven Neely, is the duly elected County Attorney for the County of Pima, State of Arizona, and is empowered, pursuant to A.R.S. § 12-2042, to bring an action in the Superior Court of the State of Arizona against any person who unlawfully holds any public office within the county.

The plaintiff, Conrad Joyner, is a member of the Pima County Board of Supervisors, the governing body

politic for Pima County. He won re-election to that seat in 1980 and his current term expires in January of 1984. Joyner has announced his intention to seek office in the newly created Fifth District of Arizona for the United States House of Representatives. He desires to retain his elected position while campaigning for Congress so he may complete his term as supervisor in the event he is unsuccessful in his pursuit of the Congressional office.

Article XXII, § 18, of the Constitution of the State of Arizona reads as follows:

> Except during the final year of the term being served, no incumbent of a salaried elected office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or *federal* office. (Emphasis added)

The parties are in agreement that because the plaintiff is not in his final year of office, the defendants could bring an action against the plaintiff forcing him to either resign or declaring his office vacant.

Recognizing this possibility, Joyner has brought this action alleging that the provision of the Arizona Constitution in question is unconstitutional insofar as it prevents him from seeking a federal office without resigning his position as supervisor.

The qualifications clause of the United States Constitution provides:

> No person shall be a representative who shall not have attained to the age of 25 years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

U.S. Constitution, Art. I, § 2, clause 2.

The Supreme Court of the United States has held that the qualifications enumerated in this clause are exclusive. In *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944 (1969), the Supreme Court held that Congress cannot add to, subtract from, or modify these qualifications. In *Powell, supra*, the House of Representatives voted to exclude Adam Clayton Powell from the house and declared his seat vacant. Powell had been elected to the 90th Congress from the Eighteenth Congressional District of New York. A special committee had been investigating expenditures in Powell's committee during the 89th Congress. There was strong evidence that certain illegal salary payments had been made to Powell's wife at his direction. Powell brought an action in federal court alleging that the action by the House of Representatives violated the qualifications clause and that the House could not legally refuse him his seat in Congress. The Supreme Court, in a lengthy opinion, reviewed the history of the qualifications clause. The court pointed out that "a fundamental principal of our representative democracy is "that the people should choose whom they please to govern them." The court went on to hold that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the United States Constitution.

The same principal that Congress cannot add to, subtract from, or modify these qualifications, applies with equal force to the states. Numerous state laws have been invalidated for imposing additional qualifications for nomination or election to Congress in violation of the Clause.[1]

Defendants have cited no authority and the court

is aware of no case which has held constitutional a provision as broad as Arizona's. Those cases that have approved a regulation were concerned with provisions which are, as will be seen below, far more narrowly drawn.[2]

The legislature of the State of Arizona has on two previous occasions passed legislation strikingly similar to the provision in question before the court now. In both *Stockton v. McFarland, supra,* and *State, ex rel Pickrell v. Senner,* 92 Ariz. 243, 375 P.2d 728 (1962), the Arizona Supreme Court noted the statutes were violative of the United States Constitution with regard to regulation of federal officers. In *Stockton, supra,* the Court examined a statute far more narrowly drawn than the statute Joyner challenges, a statute which has found some support in the judiciary in the past several years. *See generally, Signorelli v. Evans,* 637 F.2d 853 (2d Cir. 1980). In *Stockton,* the court was asked to determine the constitutionality of the following statute:

> Judges of the Supreme Court and judges of the superior courts shall not be eligible to any office or public employment other than a judicial office of employment, during the term for which they shall have been elected.

In *Stockton,* the defendant, McFarland, had met the qualifications as established by the United States Constitution to become a candidate for the United States Senate. However, because McFarland was also a superior court judge in the state of Arizona, the plaintiff alleged that McFarland should be disqualified from running for federal office. The Arizona Supreme Court held that the precise question, determinative of the issue, was whether a state, through its Constitution or statutes, can add to or take away from the qualifications for a member

of Congress prescribed by the Constitution of the United States. The Arizona Supreme Court relying on Section 5, Article 1 of the United States Constitution, wrote, "It is obvious that those qualifications of which they are to judge must be those prescribed by the Constitution of the United States and by them alone. A Representative is an officer, not of the state but of the federal government," *citing Lamar v. United States*, 241 U.S. 103 (1915). The office of representative being created by the Constitution and his power being such as therein defined, there can be no other qualifications than those contained in the Constitution itself, and, in respect to those matters, the provisions of the Constitution are the supreme law of the land. *Ekwall v. Stadelman*, 146 Or. 439, 30 P.2d 1037 (1934). In reaching this decision the Arizona court found the intent of the drafters of the Constitution to be in accord with their decision. Quoting Alexander Hamilton in the Federalist LX, the court agreed with Hamilton when he wrote:

> The qualifications of the persons who may choose, or be chosen, as has been remarked upon another occasion, are defined and fixed in the Constitution, and are unalterable by the legislature.

The State has responded to this clear line of authority by arguing first, that they have not added a qualification to running for federal office by the constitutional provision in question but have only sought to control the activities of their state officeholders, and secondly, that the state has a legitimate and valid interest in controlling the activities of their state officeholders.

In *State v. Senner, supra*, the Arizona Supeme Court dealt summarily with the question of qualifications. The court found that language which in effect required a

person to leave his present public office in order to seek another public office to be a clear and unambiguous affirmation of qualification requirements for candidates to public office. The court wrote that "to qualify for an office other than the one held the candidate must resign from his present position. It is no less clear in meaning than a provision which says that before a man can run for an office he must attain the age of twenty-five years."

Alternatively the state argues that the constitutional provision in question seeks only to control the activities of state officeholders, a legitimate state interest, and that this legitimate interest is sufficient to sustain the validity of the provision. The state has cited four cases, all of which involve the control of state judicial officeholders from running for federal office while still holding their positions in the judicial system. However, in the case at bar, the state provision applies to all salaried elected officeholders within the state of Arizona. As the court noted in *Signorelli*,[3] *supra*, in sustaining a narrower provision:

> We believe there is a distinction to be drawn between restrictions upon a broad range of occupations, which, if attempted, would indirectly impose added requirements for Congressional office upon large categories of people, and restrictions upon specified state offices peculiarly within the essential regulatory authority of the state.

Here, the state legislature of Arizona has attempted to limit the potential of every salaried elected officeholder in the state to run for federal office. To the extent that a state may be able to exercise this power in the context of state judicial officers, the statute under consideration does not draw this distinction. Article XXII, § 18 of the

Arizona Constitution applies equally to the constable of the smallest Arizona municipality and the Governor of the State of Arizona. Such a broad legislative enactment cannot pass constitutional muster, particularly given the general restrictions upon the states adding qualifications in any form to the prerequisites for running for federal office. Although a state may be free to regulate individuals running for state office, it is not free to regulate the qualifications for federal office. *Deeb v. Adams*, 315 F.Supp. 1299 (N.D.Fla. 1970).

The court has considered the relevant state interests as submitted by the Attorney General by way of exhibits. However, the court finds that these interests cannot outweigh the clear constitutional mandate that only the federal government can determine what qualifications are applicable for federal officeholders. Perhaps a more narrowly defined statute with more narrowly placed state interests could survive a constitutional challenge. However, the statute in question here clearly impedes the federal interests of uniform qualifications for federal officeholders and allowing the people of each state to have the broadest selection of qualified individuals to choose from in selecting federal officeholders. In doing so the statute violates Article I, Section 2, Clause 2, and Article I, Section 5, Clause 1 of the United States Constitution.

THEREFORE,

IT IS ORDERED that plaintiff's Motion for Summary Judgment is granted and defendant's Motions to Dismiss or in the Alternative, Motions for Summary Judgment are denied.

IT IS FURTHER ORDERED that that portion of Arizona's Constitutional provision Article XXII, Section

18, is declared unconstitutional as it relates to salaried elected officeholders offering themselves for federal office.

IT IS FURTHER ORDERED that the plaintiff Conrad Joyner may run for the House of Representatives without having to resign from the Pima County Board of Supervisors.

IT IS FURTHER ORDERED that that portion of the plaintiff's Complaint alleging violations of 42 U.S.C. § 1983 is dismissed. 42 U.S.C. § 1983 requires that before a plaintiff may succeed in his action he must demonstrate that some person has deprived him of a federally protected right. Second, the plaintiff must allege that the person who deprived him of that right acted under color of state or territorial law. *Gomez v. Toledo*, __ U.S. __, 100 S.Ct. 1920, 1923 (1980). Under the facts of this case no state official has acted in any way to deprive the plaintiff of any constitutionally protected right. The legislature has simply passed a law, potentially effecting the plaintiff, which has been declared unconstitutional, herein. Traditional absolute legislative immunity is applicable in 42 U.S.C. § 1983 lawsuits. *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

DATED this 24th day of May, 1982.

s/ ALFREDO C. MARQUEZ
United States District Judge

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FOOTNOTES

1. *Dillon v. Fiornia,* 340 F.Supp. 729 (D.N.M. 1972) (filing fee and one-year party affiliation to run in primary); *Stack v. Adams,* 315 F.Supp. 1295 (N.D.Fla. 1970) (exclusion of state officeholders); *Stockton v. McFarland,* 56 Ariz. 138, 106 P.2d 328 (1940) (exclusion of judges during term of office); *Buckingham v. State,* 42 Del. 405, 35 A.2d 903 (1944) (exclusion of judges during term of office and 6 months thereafter); *Lowe v. Fowler,* 240 Ga. 213, 240 S.E.2d 70 (1977) (exclusion of state officeholders); *Hellman v. Collier,* 217 Md. 93, 141 A.2d 908 (1958) (district residency requirement); *Danielson v. Fitzsimmons,* 232 Minn. 149, 44 N.W.2d 484 (1950) (exclusion of convicted felons); *Riley v. Cordell,* 200 Okl. 390, 194 P.2d 890 (1948) (exclusion of judges during term of office); *Ekwall v. Stadelman,* 146 Or. 439, 30 P.2d 1037 (1934) (exclusion of judges during term of office).

2. *See, Fashing v. Moore,* 489 F.Supp. 471 (W.D.Tex. 1980), *affirmed* unpublished opinion, Fifth Cir. October 31, 1980, argued before Supreme Court 50 L.W. 3090. Where District Court and Court of Appeals declared unconstitutional on equal protection grounds a far more narrowly drawn statute relating to state elected officeholders running for federal office. It should be noted that the decision herein is based upon the Qualifications Clause and Supremacy Clause of the United States Constitution and that therefore the Supreme Court's decision in *Fashing* should not effect the Court's decision today.

3. In *Signorelli,* supra, the plaintiff, Signorelli, wished to retain his judicial post while campaigning so he could complete his term as judge in the event he was unsuccessful in his pursuit of Congressional office. The Court

of Appeals cited *Stockton v. McFarland, supra,* and other cases as examples of cases that have indicated a "fundamental principal of our representative democracy that the people should choose whom they please to govern them." The court admitted that New York's regulatory scheme, though focusing on the judicial office, rather than on the ballot, imposes, albeit indirectly, a qualification upon Signorelli's freedom to run for Congress. In addition to being over 25, a citizen for seven years and an inhabitant of New York, *he must not be a state judge.* The court in sustaining the regulations pointed out that New York's purpose is to regulate the judicial office that Signorelli holds and not the Congressional office he seeks.

The court was careful to point out, however, that this line of argument was dangerous, that it could permit states, exercising their acknowledged authority to regulate occupations, to require lawyers to resign from the bar or business executives to resign corporate offices prior to seeking public office. *Such a sweeping elimination of broad categories of people from those eligible for election would conflict with the expressed intent of the framers of the constitution to maintain broad public choice of elected representatives.* The court further pointed out that there is a distinction to be drawn between restrictions upon a broad range of occupations, which, if attempted, would indirectly impose added requirements for Congressional office upon large categories of people, and restrictions upon specified state offices peculiarly within the essential regulatory authority of the state. In the statute under consideration there has been no consideration towards restricting specified state offices. Rather the legislature has simply eliminated all salaried elected state officeholders from seeking

federal office while a state officeholder. This blanket restriction upon an entire range of occupations as performed by salaried elected state officeholders is simply too broad.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONRAD JOYNER, *Plaintiff-Appellee,*	)	
vs.	)	
ROSE MOFFORD, Secretary of State, State of Arizona; ROBERT K. CORBIN, Attorney General, State of Arizona, *Defendants-Appellants.*	)	NO. 82-5552 D.C. #CIV 82-196 M **OPINION**

Appeal from the United States District Court
for the District of Arizona

Alfredo C. Marquez District Judge, Presiding
Argued and Submitted January 14, 1983

Before: GOODWIN and SNEED, Circuit Judges, and REED*, District Judge

SNEED, Circuit Judge:

This case involves a challenge by Joyner to a provision of the Arizona Constitution which forbids certain state officials from remaining in office if they run for an elected federal position before the final year of their state term. The case was brought by Joyner to enjoin its enforcement against him.[1] The district court granted the relief Joyner sought and held that the Arizona provision is unconstitutional because it conflicts with the Qualifications Clause of Article I, Section 2 of the United

* Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

States Constitution. 539 F. Supp. 1120. The State appeals. We reverse.

I.
FACTS

Conrad Joyner is a member of the Board of Supervisors for Pima County, Arizona. His present term of office began on January 1, 1981, and ends on January 1, 1985. In 1982, Joyner ran an unsuccessful campaign in the Republican primary for nomination to the United States House of Representatives.

Article 22, § 18 of the Arizona Constitution was proposed by the Arizona Legislature in 1979, and approved by the voters at the 1980 general election. It provides:

> Except during the final year of the term being served, no incumbent of a salaried elective office, whether holding by election or appointment, may offer himself for nomination or election to any salaried local, state or federal office.

Under Arizona Revised Statutes §§ 12-2041 and 12-2042, the Arizona Attorney General and County Attorney may bring a *quo warranto* action against a state official who runs for federal office in violation of Article 22, § 18 to force him to resign from the state position and to declare that position to be vacant.

Joyner contended that Article 22, § 18 is unconstitutional. The district court granted Joyner's motion for summary judgment, holding that Article 22, § 18 is unconstitutional as it relates to salaried elective state officials offering themselves for federal office. The court ordered that Joyner be allowed to run for the House of

Representatives without having to resign from the Pima County Board of Supervisors.

The State of Arizona appeals the district court's order and also argues that Joyner did not have standing to bring his action. Joyner, in addition to claiming that Article 22, § 18 is unconstitutional, also contends that we should dismiss the appeal because the case is now moot. We address the standing and mootness issues first, and then turn to the merits.

II.
STANDING

The State asserts that Joyner did not have standing to challenge the constitutionality of Article 22, § 18, except as applied to Joyner's own candidacy for federal office.

The standing doctrine derives from the "case or controversy" requirement of Article III of the United States Constitution, and "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Courts require a plaintiff to have a "personal stake" in the outcome of a case "to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (emphasis in original). To have such a "personal stake," a plaintiff must allege a "distinct and palpable injury to himself." *Id.* at 501. Such an injury can arise even from the burden of a statutory obligation. *Orr v. Orr*, 440 U.S. 268, 273 (1979). In the present case, Joyner alleges a potential injury which is sufficient to meet the standing requirement – his obligation under Article 22, § 18 to resign or be removed from his state position if he runs for federal office.

The question then arises whether Joyner has standing to assert that Article 22, § 18 is unconstitutional as it applies to third parties, i.e., all salaried elective officeholders who might seek state or federal elective office. The State relies on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), for the proposition that absent a few limited exceptions, *id.* at 611, appellants may not assert *jus tertii* standing. In that case, the Supreme Court held that a litigant may not assert the rights of third persons where he did not engage in the allegedly protected activity. *Id.* at 610. *See H. L. v. Matheson*, 450 U.S. 398, 405-06 (1981). Although, in the light of our disposition of this case on the merits, it is doubtful that our resolution of this standing issue will be of great significance, we hold that Joyner has standing to assert claims only with respect to himself and others in the State of Arizona who serve on Boards of Supervisors and who wish to stand for election to a federal office. Only with respect to that category of officials can it be said both that Joyner did in fact engage in the protected activity in which they might wish to engage, and that Joyner's complaint is identical to the complaint that they would assert when and if confronted by Arizona's bar to running for federal office before the final year of their state term. We adopt this position in the belief that it best accords with the prudential objective though to underlie the restraints on assertions of *jus tertii*. *See Craig v. Boren*, 429 U.S. 190, 193 (1976).

Nonetheless, the rule we enunciate in this case by its terms would embrace situations other than that presented by Joyner. To enunciate such a rule does not involve an issue of standing. When a rule by which a plaintiff's conduct is governed is broad enough to cover others engaged in somewhat similar activities, the fact

that the plaintiff can assert only *his* rights under the rule does not thereby narrow the rule so as to make it not applicable to others when properly invoked. Joyner's lack of standing to assert all possible *jus tertii* merely means that those who rightfully assert them later are neither encumbered nor aided by res judicata or, perhaps, by collateral estoppel.

III.

MOOTNESS

Turning to the mootness issue, Joyner contends that this case has become moot since he lost the primary election and is no longer a candidate for Congress. He argues that this case is not covered by the principal exception to the mootness doctrine, that applicable to cases that are "capable of repetition, yet evading review." *See Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972). This case, he argues, is "capable of repetition" because the constitutionality of Article 22, § 18 could be tested, and thus not "evade review," whenever another elected Arizona official stands for federal office. We are not convinced.

Election cases like the present one come within the type of controversy that is "capable of repetition, yet evading review." "Evading review" for the purpose of the exception need not mean that review is impossible. It only means that in the ordinary course of affairs it is very likely to escape review. Appellate courts are frequently too slow to process appeals before an election determines the fate of a candidate. If such cases were rendered moot by the occurrence of an election, many constitutionally suspect election laws — including the one under consideration here — could never reach appellate review. *Id.; Rosario v. Rockefeller*, 410 U.S. 752,

756 n.5 (1973). This is enough to escape the brand of "mootness."

IV.

CONSTITUTIONALITY OF ARTICLE 22, SECTION 18

Joyner's complaint specifically alleges that Article 22, § 18 violates the Qualifications Clause of Article I, Section 2 of the United States Constitution, as well as the Equal Protection Clause of the Fourteenth Amendment.[2] The district court concluded that Article 22, § 18 is unconstitutional under the Qualifications Clause and did not reach the Equal Protection claim. We reverse the district court, and also hold that Article 22, § 18 does not conflict with the Equal Protection Clause.

A. Qualifications Clause Claim

According to the Qualifications Clause, Article I, Section 2, Clause 2 of the United States Constitution:

> No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

From the beginning of the Republic, commentators have asserted that the three qualifications contained in the Clause — age, citizenship, and residency — are exclusive, and that neither Congress nor the states may require more of a candidate. *See, e.g.*, 1 J. Story, Commentaries on the Constitution 453-63 (5th ed. 1891).[3] In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court accepted this restrictive view of the Qualifications Clause — at least as applied to Congress — and held that members of Congress may not set extra-constitutional qualifications for taking a seat in the

House of Representatives. In addition, as the district court observed in the present case, the same principle has frequently been applied to state laws imposing additional qualifications on candidates for federal office. 539 F. Supp. at 1121-22 & n.1.

Neither Joyner nor the State disagrees with respect to these generalities. Joyner, quite understandably, asserts that Article 22, § 18 impermissibly conflicts with the Qualifications Clause because it imposes a fourth qualification on candidates for Congress — that they not hold elective office in Arizona unless they are in the last year of their term. The State, of course, disagrees. It argues that Article 22, § 18 does not add to the qualifications for federal office, but is an exercise of Arizona's plenary power to regulate the conduct of its own elected officials. We hold that Arizona's position is correct.

The courts considering challenges to state laws relying on the Qualifications Clause have distinguished between state provisions which bar a potential candidate from running for federal office, and those which merely regulate the conduct of state officeholders. The former category of laws imposes additional qualifications on candidates and therefore violates the Qualifications Clause, while the latter category is constitutionally acceptable since it merely bars state officeholders from remaining in their positions should they choose to run for federal office. The burden on candidacy, imposed by laws of the latter category, is indirect and attributable to a desire to regulate state officeholders and not to impose additional qualifications to serving in Congress.

For example, in *State ex rel. Pickrell v. Senner*, 92 Ariz. 243, 375 P.2d 728 (1962), the Arizona Supreme Court held that an Arizona law was unconstitutional

because it provided, in part, that incumbent state officeholders would not be eligible for federal office, and that their nomination papers would not be accepted for filing. Similarly, in *State ex rel. Santini v. Swackhamer*, 90 Nev. 153, 521 P.2d 568 (1974), the court concluded that the Nevada Secretary of State could not refuse to allow a state judge to file for election to the House of Representatives. Finally, in *Lowe v. Fowler*, 240 Ga. 213, 240 S.E.2d 70 (1977), an Atlanta city charter provision barring the President of the City Council from qualifying for another office was held not to apply to a candidate for Congress.[4]

In contrast, the latter category of laws appears in a series of recent decisions in which courts have upheld against a Qualifications Clause attack state laws which do not disqualify a state officeholder from running for federal office, but which require the officeholder to resign or be removed from the state office should he seek election to Congress.

In *Signorelli v. Evans*, 637 F.2d 853 (2d Cir. 1980), the court rejected a challenge to a New York law requiring state judges to resign from the judiciary before running for political office. The court noted that although the New York law places an indirect burden — resignation — on potential candidates, it does not prevent judges from seeking federal office. The court held that an indirect burden on candidacy might not constitute an unconstitutional qualification if the burden "is designed to deal with a subject within traditional state authority," such as the state's regulation of its judges, where its power is plenary. *Id.* at 859.[5] Other courts have adopted similar reasoning. In *Alex v. County of Los Angeles*, 35 Cal. App. 3d 994, 111 Cal. Rptr. 285 (1974), the court upheld a California law requiring judges to take a leave

of absence if they run for other public offices. The court explained that the law did not make judges ineligible for election to Congress, and that the loss of judicial salary during a leave of absence for a campaign constitutes too minor a burden on candidacy to be a qualification. And in *Oklahoma State Election Board v. Coats*, 610 P.2d 776 (Okla. 1980), the Oklahoma Supreme Court held constitutional a state law forbidding district attorneys from running for an office which overlaps with their term of service. The court emphasized that the law in question was a state law designed to regulate state officeholders. *See also Adams v. Supreme Court of Pennsylvania*, 502 F. Supp. 1282 (M.D. Pa. 1980) (upholding a Pennsylvania law requiring state judges to resign before becoming a candidate for Congress).

Joyner argues, however, that the *Signorelli* line of cases applies only to judges, and not to nonjudicial officeholders. He also contends that Article 22, § 18 is unconstitutional under the authority of *Davis v. Adams*, 400 U.S. 1203 (Black, Circuit Justice, 1970). These arguments are not convincing.

First, *Signorelli* does not stand for the proposition that the only acceptable "resign to run" statutes are those that apply to judges. Instead, the *Signorelli* court distinguished between regulations which are constitutionally permissible because they affect "specified state offices peculiarly within the essential regulatory authority of the states," and statutes placing "restrictions upon a broad range of occupations," which are constitutionally suspect. 637 F.2d at 859. Within the former category fall regulations such as Article 22, § 18, since, like the civil servants affected by the Hatch Act cases, the elected salaried state officials covered by the Arizona provision are within the State's "essential regulatory authority."[6]

See Broadrick v. Oklahoma, 413 U.S. 601, 606 (1973) (state can prevent members of civil service from running for elective office); *see also United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 556 (1973) (federal civil service). An Oklahoma court has taken this position in upholding a "resign to run" statute applying not to judges, but to district attorneys. *See Oklahoma State Election Board v. Coats*, 610 P.2d 776 (Okla. 1930).

Second, Joyner's reliance on Justice Black's "in chambers" opinion in *Davis* does not carry the day. *Davis* involved a Florida law which provided that no state officeholder could qualify for election to another office unless he had first resigned from the state position – a "resign to qualify to run" statute. The Florida Secretary of State refused to allow two sheriffs and a mayor who wanted to run for the House of Representatives to file for election. The Florida Supreme Court upheld the actions of the Secretary of State, *State ex rel. Davis v. Adams*, 238 So. 2d 415 (Fla. 1970), but a three-judge federal district court invalidated the Florida law as applied to candidates for federal office, *Stack v. Adams*, 315 F. Supp. 1295 (N.D. Fla. 1970). Justice Black granted a stay of the Florida Supreme Court decision to allow the state officials to run in the primary election.

Davis, however, was not a decision on the merits, and therefore lacks precedential value. *See Locks v. Commanding General, Sixth Army*, 89 S. Ct. 31, 32 (Douglas, Circuit Justice, 1968). Moreover *Davis* is distinguishable from the present case. For example, the Florida law at issue in *Davis* prevented a state official from *qualifying* for an election without having already resigned from state office, while Article 22, § 18 does

not forbid an official from filing for candidacy. Finally, Justice Black's statement in *Davis* that he is "inclined to think that the [Supreme] Court would hold that Florida has exceeded its constitutional powers," 400 U.S. at 1204, has been undercut by recent Supreme Court decisions concerning the power of states to regulate the conduct of elections. *See, e.g., Storer v. Brown,* 415 U.S. 724 (1973) (California law denying a place on the ballot to independent candidates who had registered with a party within one year prior to the immediately preceding primary election does not violate the Qualifications Clause); *see also Clements v. Fashing,* 102 S. Ct. 2836 (1982).

In sum, we conclude Article 22, § 18 does not impose a fourth qualification on candidates for Congress because it does not prevent an elected state officeholder from running for federal office. Nor does it prohibit the filing for nomination to Congress by an elected state officeholder. The Arizona Secretary of State allowed Joyner to file for nomination for Congress. It merely requires that Joyner resign or be removed from office if he wishes to "offer himself for nomination or election" to Congress. It regulates the conduct of state officials by requiring those officeholders who run for other positions before the final year of their term to resign or be removed from their state office. Admittedly this is an indirect burden on potential candidates for Congress; it is not sufficient, however, to constitute an impermissible qualification for federal office. *Signorelli,* 637 F.2d at 859, 863; *Alex,* 35 Cal. App.3d at 1007-08, 111 Cal. Rptr. at 294. As an early Kansas court noted:

> While we cannot interfere with the tenure of office which the United States may prescribe for its officers, it is clearly within our province

> to declare what effect the acceptance of such an office will have on the tenure of an officer of the State
>
> . . . when that is declared by the [State] constitution . . .

State ex rel. Watson v. Cobb, 2 Kan. 32, 58 (1863) (upholding in dictum state constitutional provision vacating seat of member of state legislature or judiciary who is elected to Congress).

B. Equal Protection Claim

Related to and overlapping with Joyner's Qualifications Clause claim is his Equal Protection challenge to Article 22, § 18. Under traditional equal protection analysis, legislative classifications – even those made pursuant to a state's exercise of its plenary power over state officials – are subject to varying degrees of judicial scrutiny. Normally, courts will focus on whether the classifications are rationally related to furthering a legitimate state interest. *Vance v. Bradley,* 440 U.S. 93, 97 (1979). Two exceptions to this minimum rationality standard require a stricter degree of scrutiny: when classifications disadvantage a suspect class,[7] or when they impinge upon the exercise of a fundamental right. *Plyler v. Doe,* 102 S. Ct. 2382, 2394-95 & n. 15 (1982).

In undertaking our analysis of Article 22, § 18, we are guided by the recent Supreme Court decision, *Clements v. Fashing,* 102 S. Ct. 2836 (1982). In that case, the Court rejected an Equal Protection challenge brought by several state officials to a "resign to run" provision in the Texas Constitution, similar to Arizona's Article 22, § 18.[8] The *Clements* plurality explained:

> In assessing challenges to state election laws that restrict access to the ballot, this Court has

> not formulated a "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Decision in this area of constitutional adjudication is a matter of degree, and involves a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of interests of those who may be burdened by the restrictions. *Ibid.*; *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

Id. at 2843-44. We have considered these factors carefully, and we conclude that Article 22, § 18 advances substantial and important state interests, while placing a minimal burden on potential candidates for federal office. Thus, we hold that Article 22, § 18 would pass constitutional muster under both the strict scrutiny test as well as the minimum rationality standard, and therefore do not need to determine the appropriate standard of review.[9] *See Alex v. County of Los Angeles*, 35 Cal. App. 994, 1001, 111 Cal. Rptr. 285, 289 (1974) ("resign to run" law survives both strict scrutiny and minimum rationality tests); *Oklahoma State Election Board v. Coats*, 610 P.2d 776, 781 (Okla. 1980) (same). *See also Stack v. Adams*, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970).

Our conclusion is buttressed by the analysis of Article 22, § 18 made by the Arizona Legislative Council for the 1980 referendum in which the provision was adopted. According to this analysis, there are four principal justifications for the rule. First, it encourages an elected public official to devote himself exclusively to the duties of his office. Second, Article 22, § 18 reduces the possibility of public subsidies for officials who are merely using public office as a "stepping stone." Third,

the provision prevents abuse of office before and after an election.[10] Finally, it protects the expectations of the electorate in voting a candidate into state office.[11]

These justifications are substantial, and reflect a legitimate and compelling state interest in orderly, consistent, and honest government.[12] *Cf. Anderson v. Celebreeze*, 103 S. Ct. —— & n.9 (1983). That Article 22, § 18 excepts from its coverage officials in the last year of their term does not detract from the provision, since the "last year" exception represents a reasonable compromise between the not unusual desire of an officeholder to seek a higher office and the substantial and legitimate interests of the state.

We recognize that the burden the Arizona provision imposes on potential candidates is not inconsequential. However, Article 22, § 18, to repeat ourselves, does not prevent Arizona officials from becoming candidates for other offices. It merely requires that they do not occupy a state office while seeking either a state or federal elective office. At worst it imposes upon officeholders a loss of income and the possibility of being without public office. These burdens are easily outweighed by the benefits of the Arizona provision.

The judgment of the district court is reversed.

REVERSED.

FOOTNOTES

1. Joyner also sought relief under 42 U.S.C. § 1983. The district court dismissed this claim. Joyner does not appeal its dismissal.

2. Joyner also claims that Article 22, § 18 infringes the First Amendment. A majority of the Supreme Court, however, held in Clements v. Fashing, 102 S.Ct. 2836 (1982), that a "resign to run" statute similar to the one at issue here places an insignificant burden on an elected state officeholder's First Amendment rights. *Id.* at 2848-49; *see also* Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295 (5th Cir. 1977); Adams v. Supreme Court of Pennsylvania, 502 F. Supp. 1282 (M.D. Pa. 1980). The First Amendment attack therefore must fail.

In addition, Joyner alleges that the Arizona provision conflicts with the Fourth Amendment, the Due Process Clause of the Fifth and Fourteenth Amendments, and the Privileges and Immunities Clause of the Fourteenth Amendment. These claims are wholly without merit. Article 22, § 18 infringes neither the Fourth Amendment nor the Privileges and Immunities Clause. Moreover, it does not deprive Joyner of property or liberty without due process of law since, as Justice Stevens points out in Clements v. Fashing, "a State [may] define the benefits and burdens of different elective state offices in any particular manner." 102 S. Ct. at 2849 (Stevens, J., concurring). *See* Stack v. Adams, 315 F. Supp. 1295, 1297 (N.D. Fla. 1970); *cf.* Snowden v. Hughes, 321 U.S. 1 (1944). That Arizona does not define the phrase "offer[s] himself for nomination" does not render Article 22, § 18 unconstitutionally vague. *See* United States Civil Service Commission v. National

Association of Letter Carriers, 413 U.S. 548, 576-80 (1973).

3. For a thorough survey of the origins and construction of the Qualifications Clause, *see* Powell v. McCormack, 395 U.S. 486, 522-48 (1969); *see also* State *ex rel.* Johnson v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948).

4. Most of the cases cited by Joyner follow a similar pattern of holding that state laws rendering officials ineligible for state office are unconstitutional qualifications. *See, e.g.*, Stockton v. McFarland, 56 Ariz. 138, 106 P.2d 328 (1940) (state judge not eligible for federal office); Buckingham v. State *ex rel.* Killoran, 42 Del. 405, 35 A.2d 903 (1944) (state judges forbidden from running for other positions until six months after the expiration of their term) (dictum); State *ex rel.* Handley v. Superior Court of Marion County, 238 Ind. 421, 151 N.E.2d 508 (1958) (governor not eligible for United States Senate); Riley v. Cordell, 200 Okla. 390, 194 P.2d 857 (1948) (state supreme court justice not eligible to run for nonjudicial position); Ekwall v. Stadelman, 146 Or. 439, 30 P.2d 1037 (1934) (state judge not allowed to file for nonjudicial office); *In Re* Opinion of the Judges, 79 S.D. 585, 116 N.W.2d 233 (1962) (governor and lieutenant governor not eligible for other office during term) (advisory opinion); State *ex rel.* Chandler v. Howell, 104 Wash. 99, 175 P. 569 (1918) (state judge not eligible for other office); State *ex rel.* Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W.2d 504 (1946) (state judge not eligible for nonjudicial office); State *ex rel.* Johnson v. Crane, 65 Wyo. 189, 197 P.2d 864 (1948) (governor not allowed to file for election to Senate).

Other cases holding laws to be unconstitutional

qualifications because they render candidates ineligible for federal office include Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972) (candidate must have been registered with political party for at least one year prior to filing date to be eligible to run in party primary); Exon v. Tiemann, 279 F. Supp. 609 (D. Neb. 1968) (candidates for House of Representatives must reside in the congressional district in which they are nominated); Hellman v. Collier, 217 Md. 93, 141 A.2d 908 (1958) (same); Shub v. Simpson, 196 Md. 177, 76 A.2d 332 (Md. App. 1950) (candidates must file anti-subversion declaration to be eligible for office); Danielson v. Fitzsimmons, 232 Minn. 149, 44 N.W. 2d 484 (1950) (convicted felon cannot qualify for federal office); State *ex rel.* Eaton v. Schmahl, 140 Minn. 219, 167 N.W. 481 (1918) (same); State *ex rel.* Chavez v. Evans, 79 N.M. 578, 446 P.2d 445 (1968) (candidates for House of Representatives must reside in the congressional district in which they are nominated); *In Re* O'Connor, 173 Misc. 419, 17 N.Y.S.2d 758 (1940) (communist felon not allowed to file for election to Congress); State *ex rel.* Sundfor v. Thorson, 7 N.D. 246, 6 N.W.2d 89 (1942) (candidate defeated in primary not eligible to run for same office in general election).

5. The *Signorelli* court also suggested that the separation of powers justifications for the New York provision might be analogized to those supporting the Incompatibility Clause of Article I, Section 6 of the United States Constitution. 637 F.2d at 859-63. This analogy, while intriguing, is dictum, and we need not follow *Signorelli* here.

6. The *Signorelli* court was concerned that a state might use its regulatory authority, for example, "to require lawyers to resign from the bar or business execu-

tives to resign corporate offices prior to seeking public office." 637 F.2d at 859. The state would not have the authority to do this, however, despite the state's acknowledged authority to regulate occupations," since, unlike state officeholders, lawyers and business executives are not engaged in pursuits "*peculiarly* within the essential regulatory authority of the states." *Id.* (emphasis added).

7. Although Article 22, § 18 creates a classification which distinguishes between elected state officeholders who want to run for another office before the final year of their term and all other persons, that classification does not disadvantage a suspect class. *Cf.* Clements v. Fashing, 102 S. Ct. 2836 (1982) (classification distinguishing between certain state officeholders and all other state officials in eligibility for election to state office is not suspect); Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295, 304-06 (5th Cir. 1977) (judges and other officeholders). We therefore subsume our analysis of whether Article 22, § 18 disadvantages a class of individuals in our discussion of its burden on candidacy.

8. Article XVI, § 65 of the Texas Constitution provides that a declaration of candidacy for another office by certain state officials except in the last year of their term shall constitute automatic resignation from their office. 102 S. Ct. at 2842. The *Clements* Court also considered another Texas provision, Article III, § 19, which regulates eligibility for the Texas legislature. *Id.*

None of the litigants in *Clements v. Fashing* sought to run for federal office. *The* Court therefore did not look at the Texas laws in the context of the Qualifications Clause.

9. We note that a plurality of the Supreme Court held that fundamental rights are infringed by classifications restricting access to the ballot in only two types of cases: where classifications are based on wealth, *see* Bullock v. Carter, 405 U.S. 134 (1972), and where classifications impose burdens on new or small political parties or independent candidates, *see* Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979). Clements v. Fashing, 102 S. Ct. 2836, 2844 (1982) (plurality opinion). Under this analysis, the provision at issue here would not burden a fundamental right, since it does not create classifications based on wealth or impose burdens on new or small political parties or independent candidates. Thus, there should probably be no need to depart from the traditional minimum rationality standard of review in considering Article 22, § 18.

10. As Arizona explains at pages 31-32 of its Opening Brief:

> A not insubstantial number of persons may contribute or pledge money to Joyner's campaign not because they think he will win, but because they think he may lose. . . . These are the persons whose affairs can be affected, sometimes significantly, by Board of Supervisors' actions, as on zoning, for instance. These persons may contribute or pledge to Joyner's campaign to assure that Joyner will view them with favor (or at least bear them no animus) when they . . . may be affected by Board of Supervisors' actions. This incentive to give to Joyner's campaign will be nowhere near as strong if Joyner were in the last year of his office's term. He would then not have as much time to use his incumbent office after his loss at the primary or general election to bestow as many benefits or impose as much ill effect upon the person solicited. While the Arizona pro-

vision, with its last year's exception, does not entirely eliminate opportunities for abuse of office, it tends substantially to reduce their number.

11. The *Clements v. Fashing* Court justified the Texas provisions at issue in that case in strikingly similar terms to Arizona's reasoning here. 102 S. Ct. at 2846.

12. We do not believe that Arizona could achieve these interests by means of a "less restrictive alternative." Using a recall initiative or voting the errant official out of office would be a clumsy and often ineffective means of promoting the state interests. Having state officials take a leave of absence during a campaign, *see* Alex v. County of Los Angeles, 35 Cal. App. 3d 994, 111 Cal. Rptr. 285 (1974), would deprive Arizona of the services of its officials for lengthy periods.

APPENDIX B.1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONRAD JOYNER, *Plaintiff-Appellee,*	)	
vs.	)	
ROSE MOFFORD, Secretary of State, State of Arizona; ROBERT K. CORBIN, Attorney General, State of Arizona *Defendants-Appellants.*	)	NO. 82-5552 D.C. #CIV 82-196M **ORDER**

Before: GOODWIN and SNEED, Circuit Judges, and REED*, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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* Honorable Edward C. Reed, Jr., United States District Judge for the District of Nevada, sitting by designation.

APPENDIX C

The following is a list of the states that Petitioner was able to discern as having had or still having constitutional or statutory provisions that require either that an officeholder resign before running for office, that an officeholder resign upon election to the other office, or that an officeholder be ineligible during the term of office.

1. Alabama, Article V, Section 116, as amended by Amendment No. 282, and Article VI, Section 150, as amended by Amendment No. 328. Governor and Judges not eligible for other office during term of first office.

2. Alaska, Article II, Section 5, Legislator resigns upon election to other office.

3. Arizona, A.R.S. § 38-296, resign-to-qualify-to-run; Article XXII, Section 18, resign-to-run; Article VI, Section 11, ineligible during term.

4. Arkansas, Article VI, Section 11 and Article VI, Section 22, Governor, Attorney General, Secretary of State, Treasurer and State Auditor resign upon election to other office.

5. California, Article VI, Section 17, leave of absence for judges while seeking election.

6. Colorado, Article V, Section 8, Legislator resigns upon election to other office.

7. Connecticut, Article III, Section 11, Legislator resigns upon election to other office.

8. Florida, Article II, Section 5, resign upon election.

9. Georgia, Atlanta City Charter, resign to run.

10. Hawaii, Article V, Section 3, Clause 2, Judge resigns upon election. Article IV, Section 1, Clause 5, Governor ineligible during term.

11. Indiana, Article V, Section 24, Governor and Lt. Governor ineligible during term.

12. Iowa, Article IV, Section 14, Governor and Lt. Governor resigns upon election to other office.

13. Kansas, Article I, Section 10, Governor resigns upon election to other office.

14. Louisiana, Article IV, Section 2, no other public office during tenure in office.

15. Maine, Article IV, Section 11, Governor, Legislators and Judges resign upon election to other office.

16. Maryland, Article III, Section 10, Legislators resign upon election to other office.

17. Nevada, Article VI, Section 11, Judges ineligible for other offices during term.

18. New Jersey, Article V, Section 1, paragraph 3, Governor resigns upon election to other office.

19. New York, Article VI, Section 20(b), Judges resign to run for other office.

20. North Dakota, Article IV, Section 13, State officers resign upon election to other office.

21. Ohio, Article III, Section 14, Governor resigns upon election to other office.

22. Oklahoma, 19 O.S.Supp. Section 215.8, district attorney resigns to run.

23. Oregon, Article V, Section 3, Governor resigns upon election to other office.

24. Pennsylvania, 43 P.S. Rule 15(e) of the Governing Rules of Conduct for District Judges, resign to run.

25. South Carolina, Article IV, Section 2, Governor resigns upon election to other office.

26. South Dakota, Article IV, Section 2, Governor and Lt. Governor ineligible during term. (Amended in 1972 to exclude the "ineligibility clause.")

27. Tennessee, Article III, Section 13, Governor resigns upon election to other office.

28. Texas, Article XVI, Section 65; Article III, Section 19 resign to run and ineligible during term.

29. Utah, Article VII, Section 23, Governor resigns upon election to other office, and the Governor is ineligibible to the United States Senate during term of office.

30. Virginia, Article II, Section 5, Legislature may pass "resign upon election" laws.

31. Washington, Article IV, Section 15, Judges ineligible to run during term of office.

32. West Virginia, Article VI, Section 13, Legislators resign upon election to other office.

33. Wisconsin, Article IV, Section 13, Legislators resign upon election to other office.

34. Wyoming, Article IV, Section 2, Governor ineligible during term.

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No. 83-583

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

CONRAD JOYNER,

PETITIONER,

vs.

ROSE MOFFORD, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Does Arizona's constitutional provision forbidding state elective officials from remaining in office if they run for Congress before the final year of their term violate the Qualifications Clause of the United States Constitution?

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OPINIONS BELOW

The opinion of the District Court for the District of Arizona is reported at 539 F. Supp. 1120 (1982). Appendix A to Petitioner's Brief.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 706 F.2d 1523 (1983). Appendix B to Petitioner's Brief.

STATEMENT OF THE CASE

Arizona regulates the conduct of state salaried, elected officials by requiring those who run for other elected positions before the final year of their term to resign or be removed from office. Ariz. Const., Art. XXII, § 18. This requirement does not deny the elected, salaried officials access to the ballot by preventing them from running for another office, nor does it prevent the filing of nominating petitions.

The petitioner, Conrad Joyner, was elected to the Pima County Board of Supervisors for a four-year term beginning in 1980. The following year he announced his candidacy for the newly-created fifth congressional district of Arizona. He desired to keep his Board of Supervisors position while campaigning for Congress in order to complete his term as supervisor if he was unsuccessful in his pursuit for Congress. The petitioner filed a complaint in United States District for the District of Arizona seeking to have Art. XXII, § 18 of the Arizona Constitution declared unconstitutional and to enjoin the respondents from enforcing the provision. The District Court had jurisdiction over the defendants pursuant to 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

The parties promptly filed cross-motions for sum-

mary judgment.[1] The petitioner argued *inter alia* that the Arizona constitutional provision violated the qualifications clause of the United States Constitution (Art. I, § 2, Clause 2) because it added a fourth qualification for any person running for Congress. The respondents argued that the provision did not add a qualification but only sought to control the activity of the state officeholders. The District Court held that the Arizona constitutional provision was overly broad and stated that "perhaps a more narrowly defined statute with more narrowly placed state interests could survive a constitutional challenge." *Joyner v. Mofford*, 539 F. Supp. 1120, 1124 (D.Ariz. 1982) (Petitioner's Brief, Appendix A). The court concluded that the Arizona constitutional provision violated Art. I, § 2, Clause 2, and Art. I, § 5, Clause 1, of the United States Constitution.

Reversing the District Court, the Ninth Circuit rendered its decision in *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir. 1983). The court acknowledged that there are but three qualifications — age, citizenship and residency — which are exclusive and that neither Congress nor the states may require more of a candidate. *Powell v. McCormack*, 395 U.S. 486 (1969). The Ninth Circuit also distinguished state laws which bar a candidate from running for federal office from state laws such as Arizona's which regulate the conduct of state officeholders. In the unanimous decision, Judge Sneed

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[1]The defendants were Rose Mofford, Secretary of State, State of Arizona; Robert Corbin, the Attorney General for the State of Arizona, and Stephen Neely, the County Attorney for Pima County, State of Arizona. Defendant Rose Mofford is statutorily required to accept petitions for candidates for federal office. Robert K. Corbin, the Attorney General, is authorized to bring an action to remove persons from office who unlawfully hold any public office within the State. A.R.S. § 12-2041. In addition, Stephen Neely, the County Attorney, is also empowered pursuant to A.R.S. § 12-2042 to bring the same type of action.

stated that the former type of law imposed an additional qualification on the candidate and was in violation of the qualifications clause, while the latter category was constitutionally acceptable because it merely regulated the conduct of state officeholders by removing them from their elected positions should they choose to run for Congress.[2] *Joyner*, 706 F.2d at 1528. The court held:

> [W]e conclude Article 22, § 18 does not impose a fourth qualification on candidates for Congress because it does not prevent an elected state officeholder from running for federal office. Nor does it prohibit the filing for nomination to Congress by an elected state officeholder; the Arizona Secretary of State allowed Joyner to file for nomination for Congress.
>
> *Id.* at 1531.

The final mandate was issued by the Ninth Circuit Court of Appeals on August 31, 1983.

ARGUMENT

THE RESULT REACHED BELOW DOES NOT WARRANT REVIEW

A. *The Decision of the Ninth Circuit Is Consistent with this Court's Decisions Interpreting the Qualifications Clause*

The petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Ninth Circuit because that decision is allegedly inconsistent with

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[2]The Ninth Circuit also rejected petitioner's claim that he was denied equal protection of the laws. *Joyner v. Mofford*, 706 F.2d at 1531-35. This question has not been presented for review in the petition for writ of certiorari and therefore has been waived. *Irvine v. California*, 347 U.S. 128, 129 (1954).

this Court's decision in *Powell v. McCormack*, 395 U.S. 486 (1969).[3] In that case, Adam Clayton Powell was elected to the 90th Congress, House of Representatives. Pursuant to a House Resolution, he was not permitted to take his seat due to his alleged misconduct in the 89th Congress. This Court held that the requirements of age, citizenship and residency were exclusive and that Congress could not impose other qualifications.

The impermissible exclusion of Adam Clayton Powell does not render Arizona's law invalid. The Ninth Circuit correctly read *Powell* as a general prohibition against setting "extra-constitutional qualifications for taking a seat in the House of Representatives." 706 F.2d at 1528. *Powell* does not proscribe any state action which may impact upon a person's decision to be a candidate for Congress as a violation of the Qualifications Clause of the United States Constitution. Unlike Powell, who was denied his seat by Congress after being duly elected, Joyner, the petitioner, was qualified under Arizona law, filed his nominating petitions and ran for Congress. Arizona placed no barriers between Joyner and the ballot box.

When analyzed, the petitioner's argument is not based upon a conflict between the Ninth Circuit's decision and this Court's decision in *Powell*. The petitioner's complaint is the distinction courts draw between state provisions which bar a potential candidate from running for Congress which violate the Qualifications Clause and those

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[3]The petitioner also relies on Justice Black's "in chambers" opinion in *Davis v. Adams*, 400 U.S. 1203 (1970). That case is factually distinguishable because it involved a Florida law which denied state officeholders access to the ballot. Moreover, as admitted by petitioner in the opening brief, it is "not controlling authority" in any event. Petitioner's Brief at 7.

provisions which merely regulate the conduct of the state official and do not violate the Clause. *E.g., Joyner v. Mofford*, 706 F.2d 1528-31; *Signorelli v. Evans*, 637 F.2d 853, 858-59 (2d Cir. 1980). The petitioner wants this Court to adopt a broad, new prohibition against all state laws which in any way affect a person's decision to run for Congress. This position ignores valid state interests in regulating its own state-created offices. Arizona's law may have affected the petitioner's decision to run for Congress, but it did not prevent him from running. Indeed, the petitioner filed his nominating petitions and he ran for Congress notwithstanding Arizona's law. There was no impermissible interference with the Qualifications Clause as addressed by this Court in *Powell*.

The petitioner insists that the Arizona provision limits the number of potential candidates available for Congress. However, the remedy of disqualifying a state officeholder for a state office upon becoming a political candidate for Congress has been suggested to be a *de minimis*, *Clements v. Fashing*, ____ U.S. ____, 102 S.Ct. 2836 (1982) and indirect, *Signorelli*, effect on candidacy.[4] It is not a basis for the granting of certiorari.[5]

B. *The Qualifications Clause Was Correctly Interpreted*

The petitioner inappropriately relies upon the alleged need for national uniformity in this area of the law

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[4]The Arizona law is certainly less restrictive and less burdensome than laws which deny civil servants the freedom to run as candidates for Congress or any other office. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973).

[5]The petitioner is not aided in his observation that this exact question has not been resolved by this Court. There is no reason why it should be. That fact has never been a recognized basis for the granting of certiorari.

as a basis for granting certiorari. There is no inconsistency or confusion. A state law which denies the candidate access to the ballot has been uniformly struck down. *Joyner v. Mofford*, 706 F.2d 1529, n. 4. A state law which merely regulates the conduct of state officeholders is constitutionally acceptable. *Id.*; *Signorelli v. Evans*; *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776 (Okl. 1980); *Adams v. Supreme Ct.*, 502 F. Supp. 1282 (M.D. Pa. 1980); *Alex v. County of L.A.*, 35 Cal. App.3d 994, 111 Cal. Rptr. 285 (1974). As the Ninth Circuit observed below, so long as the state places no impediment between the candidate and his access to the ballot, there is no violation of the Qualifications Clause. Indeed, of the approximately 30 cases cited by the parties relating to this issue, the determinative factor was always access to the ballot. In this case the petitioner had complete access to the ballot as a qualified candidate.

CONCLUSION

There is no federal mandate that the taxpayers of Arizona must subsidize their elected officers while they are running for Congress. The petitioner was elected to the County Board of Supervisors of his own choice and he must account for and make arrangements to cope with the limitations and burdens of that particular state office. The citizens of Arizona expect the petitioner to devote himself to county business, not to divert his attentions to partisan politics one year after his election to a four-year term. The desires of the people of Arizona are reflected in their constitutional provision, Art. XXII, § 18. It fosters their confidence in their elected officials and it in no way restricted the petitioner's ability to run for Congress in this case. Respondents therefore request this Court to deny the petition for certiorari.

RESPECTFULLY SUBMITTED,

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